

MEMORANDUM

JENNER & BLOCK

FEBRUARY 2, 2004

To: FREEDOM TO READ FOUNDATION

From: JENNER & BLOCK

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Subject: Minors' Rights to Receive Information Under the First Amendment

The Freedom to Read Foundation has asked us to review the extent to which minors enjoy First Amendment rights, particularly with respect to the use of Internet filtering software.

Before we begin that analysis, we must caution that this memorandum is merely a general discussion of these issues, and is not an opinion letter. Because laws differ from state to state, this memorandum necessarily cannot serve as the basis for legal judgments for any library faced with the decision whether to use filtering software or other content screening mechanisms. Additionally, the law related to Internet use and filtering is changing rapidly as new legislation is adopted and new court challenges are filed. A library that offers Internet access should seek legal advice for an analysis of its own particular situation and the current laws of its own state and jurisdiction.

The Supreme Court long has recognized that minors enjoy some degree of expressive liberty under the First Amendment. In the landmark case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), a public school had attempted to bar students from wearing black armbands to protest the war in Vietnam. The school feared the “controversy” the armbands might provoke. *Id.* at 510. The Court ordered the school to permit the armbands. “Students in school as well as out of school are ‘persons’ under our Constitution,” the Court explained. “They are possessed of fundamental rights which the State must respect In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.” *Id.* at 511.

Minors’ First Amendment liberties include the right to receive information and plainly extend beyond schools. In *Board of Education v. Pico*, 457 U.S. 853 (1982) (plurality opinion), a school board had attempted to remove from a school library controversial titles such as *Slaughterhouse Five* and *Soul on Ice*. The school board’s action did not restrict minors’ own expression, as the ban on armbands in *Tinker* had, but the Supreme Court rejected the action because the board was restricting what minors could read. The Court stated that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom,” *id.* at 867, and made clear that “students too are beneficiaries of this principle.” *Id.* at 868. Recent decisions of lower federal courts have echoed

the reasoning and the result of *Pico*. See *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995); *Case v. Unified School District No. 233*, 908 F. Supp. 864 (D. Kan. 1995).¹

The Supreme Court has limited minors' right to receive information (as compared to adults') in two instances. First, the court has given public schools significant latitude to restrict minors' receipt of information if the school's judgment is based objectively on the fact that information is "educationally unsuitable," rather than on an official's disagreement with or disapproval of the content of the information. The *Pico* plurality, even as it forbade schools from removing books from school libraries because of the ideas the books expressed, approved removal of books if officials were motivated by concerns that the books were "educationally unsuitable" or "pervasively vulgar." *Pico*, 457 U.S. at 871. The plurality also accorded schools, in designing curricula, substantial discretion to control minors' access to ideas. See *id.* at 864. Of course, public libraries are not concerned with curriculum decisions, and states therefore will have less weighty interests to assert where censorship occurs in the public library context.

The second restriction on minors' right to receive information, more immediately relevant to the library filtering issue, is that states may deem certain materials "obscene" for minors even if the materials are protected for adults. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld the conviction of a magazine vendor for selling an adult magazine to a 16 year-old. The Court explained that, although the magazine clearly was not "obscene" for adults, the state had acted within First Amendment bounds in adopting a distinct, broader definition of "obscenity" for minors. Because obscene speech enjoys no First Amendment protection, states under *Ginsberg* may completely bar minors from receiving material deemed obscene for them but not for adults. Accordingly, most states have enacted so-called "harmful to minors" obscenity statutes.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court restricted the broadcast of speech that was merely "indecent," not "obscene as to minors" under *Ginsberg*, largely because children might hear the indecent speech. See *Pacifica*, 438 U.S. at 749-50. The Court, however, has declined to extend *Pacifica* to other media, including telephone communications, see *Sable Communications v. FCC*, 492 U.S. 115, 127-28 (1989), and, most notably, the Internet. See *Reno v. ACLU*, 521 U.S. 844, 864-67 (1997). Of course, in *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003), the recent case considering a challenge to the Children's Internet Protection Act, the Supreme Court plainly upheld the constitutionality of a filtering software system applicable to minors. Importantly, however, the Court recognized that the filtering must be disabled at the request of an adult and that minors also had a right to request unblocking of material constitutionally protected as to them.

CIPA provides that schools and libraries applying for certain funds for Internet access available pursuant to the Communications Act of 1934 (e-rate discounts) or the Museum and Library

¹ Other cases in which the Supreme Court emphasized minors' right to receive information include *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975) (holding that "[s]peech . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them") and *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 n.30 (1983) (criticizing a federal ban on mailing unsolicited contraceptive advertisements because it ignored adolescents' "pressing need for information about contraception").

Services Act (LSTA grants) may not receive such funds unless they certify that they have in place a policy of Internet safety that includes the use of technology protection measures, *i.e.*, filtering or blocking software, that protects against access to certain visual depictions accessible through the Internet. Specifically, the school or library seeking funds must certify that it has filtering or blocking software in place that will block access for *minors* to visual depictions that are obscene, child pornography or harmful to minors. The school or library must also certify that it has filtering or blocking software in place that will block access for *adults* to visual depictions that are obscene or child pornography. The technology protection measure must be placed on *all* computers, including those computers used by staff. An administrator, supervisor or other authorized person may disable the filtering software for adults, but only to enable access for “bona fide research or other lawful purposes.”²

CIPA was challenged in two lawsuits filed in the Eastern District of Pennsylvania. Both lawsuits alleged that application of CIPA in the context of the public library violated the First Amendment. On May 31, 2002, a three-judge panel held unanimously that the statute was unconstitutional. The court found that “[b]ecause of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is both constitutionally protected and fails to meet even the filtering companies’ own blocking criteria.” *American Library Ass’n v. United States*, 201 F. Supp. 2d 401, 453 (E.D. Pa. 2002), *rev’d*, 123 S. Ct. 2297 (2003). The court also concluded that the disabling provision did not cure the unconstitutionality of the statute because requiring a patron to request access to constitutionally protected speech was stigmatizing and significantly burdened the patron’s First Amendment rights.

In June, 2003, the Supreme Court reversed the lower court’s holding in a plurality opinion. The reversal was premised largely on the fact that six of the nine Justices of the Supreme Court accepted the U.S. Solicitor General’s assurance during oral argument that adults could request that filtering be disabled without specifying any reason for the disabling request. Thus, in the plurality opinion, Chief Justice Rehnquist (joined by Justices O’Connor, Scalia and Thomas) concluded that the statute was not unconstitutional because “[t]he Solicitor General confirmed that a ‘librarian can, in response to a request from a patron, unblock the filtering mechanism altogether’ . . . and further explained that a patron would not ‘have to explain . . . why he was asking a site to be unblocked or the filtering to be disabled.’” 123 S. Ct. at 2306-07.

The Court’s plurality opinion contemplated that “[w]hen a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter.” *Id.* at 2306. Thus, while it would appear to be impermissible for a librarian to disable the filter entirely for a minor, librarians may unblock particular sites for minors. And, in fact, given that minors have explicit First Amendment rights, it would raise serious constitutional questions if a librarian refused to unblock a site that did not constitute obscenity, child pornography or material harmful to minors.

Of course, the Court’s ruling in the CIPA case has put librarians in the position of having to determine whether material is obscene, child pornography or harmful to minors. Thus, if a library decides to accept the specified funding encompassed by the CIPA case, the library will need legal guidance as to the definitions of obscenity, child pornography and material harmful to

² 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D).

minors. Definitions will vary from state to state. Regardless of the definition, however, ascertaining whether material is obscene, child pornography or harmful to minors will be difficult as those judgments can only be made properly by a Court. Nonetheless, librarians will need to make some findings in an attempt to insure that minors do receive access to blocked material that is constitutionally protected for them.

Moreover, courts have recognized limits on the *Ginsburg* principle. First, the Supreme Court has made clear that states may not simply ban minors' exposure to a full category of speech, such as nudity, when only a subset of that category can plausibly be deemed "obscene" for them. See *Erznoznik*, 422 U.S. at 212-14. Second, courts have held that states must determine *Ginsberg* "obscenity" by reference to the entire population of minors – including the oldest minors, whose faculties are not so limited as *Ginsberg* presumes younger minors' to be. One of the grounds on which the Supreme Court in *Reno* distinguished *Ginsberg* was that the "harmful to minors" statute at issue in *Ginsberg* did not apply to 17 year-olds, whereas the Communications Decency Act at issue in *Reno* did. See *Reno*, 521 U.S. at 865-66. The Court went on to stress "that the strength of the Government's interest in protecting minors is not equally strong throughout the [age] coverage of this broad statute." *Id.* Likewise, some lower courts have upheld restrictions on displays of adult magazines only if the restrictions did not prohibit the display of materials that would be appropriate for older minors. See *American Booksellers v. Webb*, 919 F.2d 1493, 1504-05 (11th Cir.)(1990); *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989).

The Supreme Court has not directly considered a public library's use of particular filtering software to limit minors' access to Internet materials or evaluated a specific case where a minor was restricted from viewing material that the minor alleged was constitutionally protected for minors. Under *Tinker*, *Erznoznik*, and *Pico*, any court that reviewed a particular filtering policy – as drafted and as applied to particular minor patrons – would have to take minors' expressive rights into account. Because no court ever has suggested that a library shares the inculcative function of public schools, a court could permit filtering for minors only if the filtering policy was necessary to protect minors from material that could properly be deemed obscene for everyone or "harmful to minors" under *Ginsberg*. Even that might not save the filtering policy, however, if the court concluded that the policy encroached unacceptably on older minors' right to receive information appropriate for them, or incidentally banned minors' access to even broader categories of speech, including speech that would not be considered obscene or harmful to anyone.